

IN THE COURT OF CRIMINAL APPEALS OF TENNESSEE

AT KNOXVILLE

FEBRUARY 1997 SESSION

FILED
March 16, 1999
Cecil Crowson, Jr.
Appellate Court Clerk

WILLIAM H. NECESSARY, JR.,)
)
Appellant,)
)
v.)
)
STATE OF TENNESSEE,)
)
Appellee.)

No. 03C01-9601-CC-00009
Washington County
Honorable Arden L. Hill, Judge
(Post-Conviction)

For the Appellant:

Roger A. Woolsey
118 South Main Street
Greeneville, TN 37743

For the Appellee:

Charles W. Burson
Attorney General of Tennessee
and
Karen M. Yacuzzo
Assistant Attorney General of Tennessee
425 Fifth Avenue North
Nashville, TN 37243-0493

David E. Crockett
District Attorney General
Rt. 19, Box 99
Johnson City, TN 37601
and
Kent Garland
Assistant District Attorney General
P.O. Box 38
Jonesborough, TN 37659

OPINION FILED: _____

AFFIRMED

Joseph M. Tipton
Judge

OPINION

_____The petitioner, William H. Necessary, Jr., appeals as of right from the denial of post-conviction relief by the Criminal Court for Washington County. He is attacking a forty-year sentence that he is presently serving for aggravated rape. He contends (1) that he received the ineffective assistance of counsel, (2) that his conviction should be set aside because of evidence that the victim recanted her testimony, and (3) that the trial court erred at the evidentiary hearing by refusing to allow two witnesses to testify about the victim's inconsistent statements concerning the aggravated rape. We affirm the trial court's denial of relief.

The basic facts surrounding the offense are stated in this court's opinion in the direct appeal as follows:

On November 2, 1987, the victim, 12 years old, returned home from school with her younger sister. Because their mother was not there, they went to a neighbor's house. When the victim realized that she had mistakenly picked up a brother's book instead of her own, she returned to her residence to exchange the books. On the way out of the house, she saw the defendant, a first cousin, sitting on the couch beside the front door. He was not there when she came in.

Before the victim could leave, the defendant grabbed her, ripped her shirt off, removed her pants, and forcibly raped her. When the victim struggled the defendant struck her in the face, knocked off her glasses, and then stepped on them. He threatened to harm the victim if she told of the encounter.

After the assault, the victim burned her ripped shirt and placed her other clothes in a bag her mother intended to give away. She put on clean clothes, got her book, and returned to her neighbor's house, crying. The victim explained that she was sick, lay down, and continued to cry.

The incident was reported to the sheriff's department a few days later but, because of a shortage of investigators, was not investigated until January of 1988. When confronted by officers, the defendant admitted visiting the victim's home around the time of the rape, but denied assaulting the victim.

At trial, the defendant denied that he raped the victim and claimed to have been visiting his sister in North Carolina for about two months during that period of time. He could not remember, however, the town in which his sister lived. The defendant suggested that he was being prosecuted because the victim's parents did not like him.

State v. William Necessary, Jr., No. 266, Washington County, slip op. at 1-2 (Tenn. Crim. App. Mar. 4, 1991).

At the evidentiary hearing on the petition for post-conviction relief, the petitioner's trial attorney testified that he had practiced criminal law for eighteen years and was retained to represent the petitioner. He said that he replaced an attorney the petitioner already had and that he talked with the petitioner's first attorney several times. He said the first attorney had filed a Motion for Discovery pursuant to Rule 16, Tenn. R. Crim. P. He said he intended to proceed with the motion, but the state and its witnesses were very cooperative, and he did not think it was necessary to pursue the motion. He said the state had an open file policy, and he looked through everything in the file, including the victim's statement.

The attorney stated that the petitioner's sister sometimes accompanied the petitioner when they met. He strongly denied the petitioner's contention that they met only three times. He said he probably kept time sheets for the case, but he did not have them because he periodically deletes files that are not critical in order to save space. He agreed that it was important to preserve files in the event of a post-conviction petition.

The attorney testified that he spoke with Dr. Donald Hires, who he believed performed a mental evaluation on the victim, and that the doctor told him he believed the victim's allegation. The attorney admitted that before trial, he heard that the victim's mother claimed the victim told her that the petitioner did not rape her. He

said he followed up on the allegation, but the victim's mother denied that the victim had recanted. He said he tried to talk to the victim, but she would not cooperate and her parents would not allow it. He said he did not remember speaking with the victim's sister, Kristy Necessary, but he thought her parents may have refused to allow him to talk to her. He said he never heard before trial that Kristy Necessary said that the victim had recanted. The attorney admitted that the state's only evidence was the victim's testimony and that the case hinged on her credibility, but he said that he did not request any further evaluation of the victim to explore whether she had been pressured by her family into accusing the petitioner.

The attorney testified that he may have asked the judge for the jury list on the day of trial, but he testified that he had seen the list a few days earlier and had gone over it with the petitioner. He said he spoke with many family members and with Department of Human Services workers, but they were not very cooperative. He agreed that the issue of the admissibility of alleged sexual contact between the victim and her father may not have been raised until after trial. He admitted that he did not talk to the doctor that physically examined the victim, but he said that months had passed from the time the rape occurred until the examination. He also said that the petitioner told him that the victim was having sex with her father and brother, and the attorney felt that a physical examination would not have revealed anything helpful.

The attorney testified that he talked with the district attorney about a possible plea agreement, but he did not remember if a plea agreement had been offered. He said he definitely asked the district attorney for a plea agreement, but if one had been offered, the petitioner would have rejected it. He said he did not know why he did not seek to introduce evidence of the petitioner's lack of criminal history. He said he did not call character witnesses on behalf of the petitioner because no one the

petitioner knew was reputable, and everybody in his family had problems with incestuous relationships.

On cross-examination, the attorney stated that the petitioner accompanied him on at least four occasions to investigate the case. He said he discussed the possibility of a psychological evaluation with the petitioner, but the petitioner definitely did not want one. He said the petitioner insisted that he did not rape the victim, and the attorney felt that the only possible defense was that the victim had sex with other family members.

Betty Hill, the petitioner's sister, testified that she accompanied the petitioner to all of the meetings with his attorney. She said the petitioner had always been in special education classes and could not read or write. She said she accompanied him to his attorney's office in order to help him understand. She said she and the petitioner met with the attorney three times at the most. She said they went to the attorney's office for appointments, and several times the attorney was not there. She said the attorney never requested a psychological evaluation for the petitioner. She said the attorney told the petitioner that the state had offered a plea bargain but that he should not take it. She said neither she nor the petitioner received a list of the jury before trial. She said she told the attorney that the victim had sex with other people. She said the attorney was supposed to have gotten the victim's juvenile records and gone to the victim's school, but she did not know if he had. She said the attorney told the petitioner not to worry and that if the petitioner received any time at all, it would not be much.

Lori Ellis testified that she is the petitioner's cousin but that she is not related to the victim. She testified that she thought the matter was between the victim and the petitioner and that no one else should be involved. She testified that in late

1987 or early 1988, she rode with the victim and the victim's family to Johnson City where the victim was to be evaluated by a doctor and a social worker regarding the events of this case. She said that when they stopped for gas and the victim's father left the car, the victim leaned over and told her mother that the petitioner did not mess with her and that someone else did. She testified that the victim said she was afraid and thought she should blame it on the petitioner because he was at her house more than anyone else. Ms. Ellis testified that the victim's mother told her not to say anything else and that the victim's sister said the victim was not supposed to be talking about that. Ms. Ellis stated that after the victim was examined in Johnson City, a doctor told the victim's mother that the victim said no one had messed with her.

On cross-examination, Ms. Ellis stated that she did not report what the victim said to anyone because it was none of her business. She then stated that she told the petitioner's attorney about the victim's statements before trial.

Bobby Walker testified that he was the victim's ex-husband. The trial court did not permit Mr. Walker to testify regarding statements made to him by the victim on the ground that the statements were hearsay. However, Mr. Walker's affidavit was admitted as an offer of proof. In the affidavit, Mr. Walker stated that the victim told him on more than one occasion that her father had sex with her before she became a teenager and that once, he forced her to have sex at knife point. Mr. Walker also stated in the affidavit that the victim said that she was going to sign papers to get the petitioner released from jail.

Kristy Necessary, the victim's sister, testified that she did not know if her father molested the victim. She said the victim went back and forth on the issue. Her affidavit was admitted into evidence. In the affidavit, Ms. Necessary said that the victim's boyfriend, Jody Simpson, told her that the victim said that her father had

molested the victim. In the affidavit, Ms. Necessary also stated that the victim told her several times that the petitioner did not rape her. On cross-examination, she stated that the victim went back and forth on the issue of whether the petitioner raped her.

The petitioner testified that he had no prior criminal history and that he had an eighth grade education. He said he only spoke with his attorney once without his sister. He said that he and his attorney went to the house where the victim and her brother "used to mess around." He said he talked with his attorney about eight or nine times. He said his attorney never gave him a jury list nor told him about a plea bargain, although he said the attorney might have told someone else about a plea bargain.

On cross-examination, the petitioner stated that the jury never got to hear the witnesses his attorney was trying to get them to hear. He said he made two trips with his attorney to investigate the case.

The victim testified that her family harassed and threatened her because of the rape. She said she never told anyone that the petitioner did not rape her.

On cross-examination, the victim testified that she still dated Bobby Walker. She denied telling Mr. Walker that she and her father had sex when she was a teenager. She said she did not tell Mr. Walker that she wanted to sign papers to get the petitioner out of jail, and she said she did not know why he would lie about it. She denied telling her mother, in front of Lori Ellis, that the petitioner did not mess with her. She said she did not know why Ms. Ellis would lie. She also testified that she never told her sister that her father had sex with her, although she said she did tell her sister that the petitioner raped her. She said she never recanted. She said she did not remember if she told Jody Simpson that her father had sex with her.

The trial court denied the petition for post-conviction relief. It found that the petitioner's trial attorney properly represented the petitioner at trial. The court also found that the petitioner did not introduce any evidence that was not known or introduced at trial that would have changed the result of the trial.

I. INEFFECTIVE ASSISTANCE OF COUNSEL

The petitioner raises several issues with respect to his attorney's performance, all of which relate to his attorney's preparedness for trial. Specifically, the petitioner argues that his attorney (1) did not proceed with the discovery motion, (2) did not talk to the victim or her sister before trial, (3) did not remember speaking to DHS workers, (4) did not make an offer of proof regarding the victim's alleged sexual conduct with her father, (5) did not talk to the doctor who performed the physical examination of the victim, (6) did not remember whether the state offered a plea agreement, and (7) did not have a jury list on the day of trial. The state contends that the trial court properly concluded that the defendant received the effective assistance of counsel. We agree.

Under the Sixth Amendment, when a claim of ineffective assistance of counsel is made, the burden is upon the petitioner to show (1) that counsel's performance was deficient and (2) that the deficiency was prejudicial in terms of rendering a reasonable probability that the result of the trial was unreliable or the proceedings fundamentally unfair. Strickland v. Washington, 466 U.S. 668, 687, 104 S. Ct. 2052, 2064 (1984); see Lockhart v. Fretwell, 506 U.S. 364, 368-72, 113 S. Ct. 838, 842-44 (1993). The Strickland standard has been applied, as well, to the right to counsel under Article I, Section 9 of the Tennessee Constitution. State v. Melson, 772 S.W.2d 417, 419 n.2 (Tenn.), cert. denied, 493 U.S. 874 (1989).

In Baxter v. Rose, 523 S.W.2d 930, 936 (Tenn. 1975), our supreme court decided that attorneys should be held to the general standard of whether the services rendered were within the range of competence demanded of attorneys in criminal cases. Further, the court stated that the range of competence was to be measured by the duties and criteria set forth in Beasley v. United States, 491 F.2d 687, 696 (6th Cir. 1974) and United States v. DeCoster, 487 F.2d 1197, 1202-04 (D.C. Cir. 1973). Also, in reviewing counsel's conduct, a "fair assessment of attorney performance requires that every effort be made to eliminate the distorting effects of hindsight, to reconstruct the circumstances of counsel's challenged conduct, and to evaluate the conduct from counsel's perspective at the time." Strickland v. Washington, 466 U.S. at 689, 104 S. Ct. at 2065; see Hellard v. State, 629 S.W.2d 4, 9 (Tenn. 1982) (counsel's conduct will not be measured by "20-20 hindsight"). Thus, the fact that a particular strategy or tactic failed or even hurt the defense does not, alone, support a claim of ineffective assistance. Deference is made to trial strategy or tactical choices if they are informed ones based upon adequate preparation. See Hellard v. State, 629 S.W.2d at 9; United States v. DeCoster, 487 F.2d at 1201.

Also, we note that the approach to the issue of the ineffective assistance of counsel does not have to start with an analysis of an attorney's conduct. If prejudice is not shown, we need not seek to determine the validity of the allegations about deficient performance. Strickland v. Washington, 466 U.S. at 697, 104 S. Ct. at 2069.

In light of the foregoing, we hold that the trial court properly concluded that the petitioner received the effective assistance of counsel. With respect to the petitioner's contention that his attorney failed to pursue the discovery motion, the attorney testified that it was not necessary because the state provided him with access to everything in its files. The petitioner has not demonstrated that his attorney's conduct was below the normal range of competence or that he was prejudiced.

With respect to the petitioner's contentions that his attorney did not talk to the victim, her sister, or DHS workers before trial, the attorney testified that he tried to talk to both the victim and her sister but that they would not talk to him. Furthermore, he testified that he spoke with DHS workers but that they were uncooperative. The attorney testified that he did read the victim's statement before trial. The petitioner has not shown what more his attorney could have done, nor has he shown that his attorney's conduct prejudiced him at trial.

The petitioner also complains that his attorney failed to make an offer of proof regarding the victim's alleged sexual conduct with her father. On the contrary, the trial transcript reveals that the attorney made a detailed offer of proof. He called five witnesses to testify about the victim's alleged sexual conduct with both her father and brother and stated that it was an affront to the judicial system of this country to allow the case to be tried without allowing that evidence to be heard by the jury. The trial court ruled that the evidence was inadmissible. The petitioner's contention that his trial attorney failed to make an offer of proof is simply not supported by the record.

The petitioner complains that his trial attorney did not speak with the doctor who performed the physical examination of the victim. However, the attorney testified that the examination did not occur until several months after the rape. He further testified that the petitioner told him that the victim had sexual relations with her father and brother. Thus, short of discovering that the victim was a virgin, the attorney did not think that speaking to the doctor would uncover useful information. The petitioner has failed to demonstrate what information his attorney could have learned from speaking with the doctor or how this information would have helped his case.

Finally, the petitioner claims that his attorney could not remember whether the state offered a plea agreement and that his attorney did not have a jury list. The

record indicates otherwise. At the evidentiary hearing, the attorney testified that he definitely discussed the possibility of a plea agreement with the district attorney. The attorney's failure to remember the results of that discussion at the evidentiary hearing does not render his performance at trial ineffective. In addition, although the attorney may not have had the jury list with him on the morning of trial, he testified that he had obtained a copy of the jury list and had discussed the list with the petitioner before trial. The evidence does not preponderate against the trial court's finding that the petitioner received effective representation. State v. Burford, 666 S.W.2d 473, 475 (Tenn. Crim. App. 1983).

II. NEW EVIDENCE

The petitioner contends that the trial court erred by denying his petition and failing to set aside his conviction in light of the evidence that the victim recanted her accusation against him. He specifically points to the testimony and affidavits of Lori Ellis, Bobby Walker and Kristy Necessary to support the proposition that the victim recanted. In his post-conviction petition, he alleges that this new evidence shows that he is innocent. The state contends that the petitioner's claim is not cognizable in a post-conviction petition. We agree.

The Post-Conviction Procedure Act applicable to this case provides that post-conviction relief shall be granted "when the conviction or sentence is void or voidable because of the abridgment of any right guaranteed by the constitution of this state or the Constitution of the United States" T.C.A. § 40-30-105 (1990). The petitioner's claim is not constitutional in nature; rather his complaint is that because there is new evidence that the victim recanted her testimony, his conviction should be set aside and he should be granted a new trial. Although this might be a proper ground for a writ of error coram nobis, it is not an appropriate ground for post-conviction relief. See Randy Hicks v. State, No. 03C01-9608-CR-00296, McMinn County (Tenn. Crim.

App. Mar. 3, 1996) (holding that a claim of newly discovered evidence, standing alone, is not a constitutional issue entitling a petitioner to post-conviction relief); see generally, State v. Vaughn Mixon, No. 02C01-9507-CC-00204, Chester County (Tenn. Jan. 19, 1999) (indicating that a writ of error coram nobis is the appropriate forum for addressing claims of innocence based upon newly discovered evidence of a victim's recantation).

III. TESTIMONY OF BOBBY WALKER AND KRISTY NECESSARY

The petitioner complains that the trial court erred by not allowing Bobby Walker and Kristy Necessary to testify at the evidentiary hearing concerning inconsistencies in the victim's statements about the aggravated rape. The petitioner contends that their testimony regarding what the victim told them was not hearsay but was admissible to impeach the victim's statements at the trial. The state makes no argument in response.

The transcript of the evidentiary hearing reflects that when Bobby Walker, the victim's ex-husband, attempted to testify regarding statements the victim made to him while they were married, the district attorney objected on the grounds of hearsay. The petitioner's trial attorney argued that the statements were not being offered for their truth but rather to impeach the victim's trial testimony. However, the court sustained the objection. Mr. Walker's affidavit was admitted into evidence as an offer of proof. In the affidavit, Mr. Walker stated that the victim told him that she had sex with her father before she was a teenager and that she was going to sign papers to have the petitioner released from jail.

The transcript from the evidentiary hearing also reflects that the victim's sister, Kristy Necessary, testified that the victim went back and forth on the issue of whether the petitioner raped her. Ms. Necessary's affidavit, in which she made

statements consistent with her testimony at the evidentiary hearing, was admitted into evidence.

We note that the record reveals that the trial court did allow Ms. Necessary to testify about the victim's alleged recanting of her allegation against the petitioner. Furthermore, the petitioner's claim with respect to Mr. Walker's testimony is likewise without merit. The petitioner argues that Mr. Walker would have testified that the victim recanted her allegation against him. This testimony would only support the petitioner's argument that the trial court erred by not setting aside his conviction upon the evidence of the victim's recantation, an issue that we have already concluded is not cognizable in a post-conviction petition.

In consideration of the foregoing and the record as a whole, we hold that the trial court did not err by denying the petition for post-conviction relief.

Joseph M. Tipton, Judge

CONCUR:

Jerry L. Smith, Judge

Thomas T. Woodall, Judge